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TELEPHONE SURVEILLANCE IN BRAZIL: ANALYZING THE DIMINISHING RETURNS FOR EVIDENCE COLLECTION

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Abstract:
The interception of telephone communications in the Brazilian legal system has long been considered an essential means of obtaining evidence. This practice, although authorized as an exception to the fundamental right of communication inviolability, has faced numerous challenges since its regulation in 1996. Legislative proposals, controversies, and even a congressional inquiry have marked its history. However, recent developments in alternative methods of obtaining evidence, such as rewarded cooperation, have overshadowed the significance of telephone interception. This shift is reflected in the diminishing interest of legal professionals, limited publications, and law enforcement's perception of its practicality. Nevertheless, it's important to emphasize that a lack of transparent data and official evaluation makes it premature to conclude that telephone interception has become obsolete. The true relevance of this practice remains subject to empirical examination.

Keywords: Telephone interception, Brazilian legal system, Evidence gathering, legal reforms, Fundamental rights.

Introduction

The interception of telephone communications is an important means of obtaining evidence foreseen in the Brazilian legal system, characterized as precautionary evidence, as foreseen in article 155, final part, of the Code of Criminal Procedure. Authorized as an exception to the fundamental right to inviolability of communications in article 5, XII of the Constitution, interception was regulated in 1996 by Law number 9,296. Since then many problems have been faced by the courts, the doctrine, and the National Congress, not only with the various proposals for legislative change, but even a CPI to investigate the abuses in its use.

For some time now, especially with the advent of the creation and regulation of other means of obtaining evidence, notably rewarded cooperation, telephone interception has been losing ground in the interest of the legal community, both as a research topic and object of publications, and even with regard to the perception of the enforcers of the law on its practical use, to the extent that even the STF justices themselves, in the judgment of RE 625.263, which defined the existence or not of a limit on decisions to renew telephone interception, expressed their understanding that telephone interception has become a useless means of proof. However, it is important to point out that the CNJ, as of 2019, no longer treats this phenomenon with due transparency, such that the idea that telephone interception has lost its importance as a means of obtaining evidence is mere opinion, not founded on concrete data.

Fact is that until 2018 there were 300,000 interceptions per year on average (Santoro & Lucero Frias Tavares 2019, 103), which implies saying that its relevance in the production of information in the Brazilian criminal process makes it essential to analyze its compatibility with the basic guarantees that constitute a democratic criminal process. A theme that has attracted little attention from researchers is the assessment of the elements

brought to the attention of the magistrate in order for a decision to be made on whether or not to authorize telephone interception, as well as the possible injustices resulting therefrom. This is the subject of this article. After all, are there specific epistemic problems with telephone interception? If so, is it possible to identify them? In order to face the problem, two methodological approaches will be adopted. The first will consist of theoretical research through bibliographical sources and will be divided in the first plan in the dogmatic confrontation regarding the requirements for the granting of the interception measure. In second plan, we will directly address the epistemic issues that affect the judicial activity in the act of deciding on the authorization of the measure, as we will deal with the evidential inferences in telephone interception.

The second approach is based on empirical research consisting of semi-structured interviews with magistrates of the Judicial Section of Rio de Janeiro. The formalities of a research by interview technique presented by Maria Cecília de Souza Minayo (Minayo 2014, 263/264) were observed, a presentation of the research was made to the interviewees, the interest of the research was mentioned explaining what the research was about and the contribution they could make, the institutional credentials of the interviewer/researcher were presented, the reasons for the research were explained, as well as the justification for the choice of interviewees, anonymity and data confidentiality were guaranteed since this was not a media interview, and an initial conversation was held before starting the interview itself.

They were invited by letter sent by e-mail directly to the address of the office of the federal criminal courts of the capital of Rio de Janeiro and Petrópolis, since the research was developed in universities based in the two cities. In all, of the 21 magistrates invited, 6 volunteered to be interviewed, with their consent and the requirement that their names not be publicly disclosed, which is why their identities and respective courts will not be disclosed.

The questions were asked directly to the magistrates, who were available to participate by videoconference, due to the pandemic period. At each question, the interview could be expanded with the dialog arising from the content of the answers. The basic questions that guided the interview were: (1) what criteria do you use to determine whether or not there is another way to obtain the information that the interception is intended to reveal? (2) What element or data do you use to determine that there is a need to renew the interception of communications (police report, recording, listening to the audio, summary of conversations, etc.)? (3) How many times can the interception of communications be extended? (4) Have you already ordered the interception of telephone communications of the accused during the course of the lawsuit? (5) Have you already ordered the interception of telephone communications on your own initiative? (6) Have you already declared the nullity of the telephone interception? (7) Do you listen to all of the conversations recorded?

The answers will be partially presented in the third item of this article, according to the content that is of direct interest to the approach that will be made on the epistemic problems identified in telephone interception, thus bringing a solution of continuity in the approach to the subject, interweaving and relating the theoretical perspective and the vision of the magistrates, who will be identified by a number, according to the order in which the interviews were conducted.

1. Evidentiary inferences for the granting of telephone interception measures

As already mentioned in the introduction, the interception of telephone and data communications is a measure provided by law, which requires prior judicial authorization and its requirements are present in Law nr. 9.296/96. We must analyze the requirements established in the law, in articles 2 and 4, *caput*. For Lenio Streck (Streck 2001, 51), subsection I configures the case of *fumus boni juris* (Luiz Flávio Gomes and Silvio Maciel (Gomes and Maciel 2014, 96) call it *fumus delicti commissi*), since it can only be determined the interception of the indicative author or participant of a criminal offense.

Items II and III would configure, according to the doctrine, together with the need foreseen in art. 4 (Streck 2001, 51 and Gomes and Maciel 2014, 99), the cases of *periculum in mora* or *periculum libertatis*. Here several problems arise. The first is the idea contained in item II that interception can only be determined if there is a last *ratio probatoria*. It should be noted that, unlike the legislator's provision when Law 13,964/2019 established the requirements for capturing electromagnetic, optical or acoustic signals, it was not established that telephone interception will be allowed if the other means are not equally effective.

The issue in telephone interception is straightforward: if there is another means of proof or means of obtaining proof, equally effective or not, interception is inadmissible. This is what Streck calls an "absolute exception", where it must be verified whether all existing legal means preceded the interception; it is a *conditio sine qua non* for the investigation of the infraction. Despite the abstract conceptual clarity, the question remains in practice, how will the judge determine whether it is possible to apply another legal means in the concrete case? What criteria should the judge have at his disposal?

Not for another reason Luiz Flávio Gomes and Silvio Maciel state that although it is one of the most important requirements, it is perhaps the most violated. The big question is that its relativization may lead to what Manuel Monteiro Guedes Valente called attention to in his book on telephone interception in Portuguese law: from exceptionality to vulgarity.

Not under the topographical point of view, but in terms of systemic logic, it is together with item II, which indicates the subsidiarity of the means of evidence, that the necessity must be analyzed, pointed out by Streck (Streck 2001, 83) as a constitutive requirement of the *periculum in mora* or *periculum libertatis*. The idea of necessity refers to the indispensability of the interception of telephone calls to investigate an infraction, as expressed in section 4 of Law No. 9.296/96. Telephone interception can only be admitted if it is impossible to prove it by any other means, it must be necessary.

Our understanding is somewhat different.

Breaking with the traditional classification of precautionary requirements into *fumus boni juris* (or *fumus commissi delicti*) and *periculum in mora* (or *periculum libertatis*), Santoro and Gonçalves understand that the requirements of every precautionary evidence measure are the "necessity of the evidence measure" (understood as certainty of the crime, probability of authorship and pertinence of the evidence measure in relation to the intended purpose) and the "danger of loss of evidence" (understood as the risk of loss of the source of evidence by the passage of time or by the prior knowledge of the investigated, according to new or contemporary factual data at the time of the decision) (Santoro & Gonçalves 2021, 110).

That said, it is important to distinguish the necessity of the evidence in relation to the intended purpose and the urgency of producing it. The former constitutes an element of the "necessity of the evidential measure", while urgency constitutes an element of the "danger of loss of evidence". Thus, we understand that article 4 of Law No. 9.296/96, which deals with necessity, but not urgency, constitutes an element of the requirement consistent with the "need for the evidential measure". Item III, in turn, establishes that interceptions cannot be allowed in the case of offenses punishable at most by detention, which makes us, a *contrario sensu*, understand that it is possible to determine the measure for any crime punishable by imprisonment.

Some voices have been raised in regard to the prohibition of the use of telephone interception for crimes punishable by detention, but whose justification would be that the crime was committed only by telephone and, therefore, when there is no other way to integrate the evidence, as is the case of the threat or offense to honor made only by telephone, it would be possible to admit interception as valid and effective in these cases (Nery Júnior, 1997, p. 35), which, with all due respect, is absolutely unacceptable insofar as the relativization of fundamental rights only does not reach their essential core when understood in the form of legal typicality, on

which no extensive interpretation can be made, much less broaden its hypotheses beyond the express text of the regulating law.

The most severe criticism, however, is in the sense of violation of the principle of proportionality by Antonio Magalhães Gomes Filho, for whom "the constitutional text itself indicated the imperious need for an anticipated ponderation, by the legislator, between the right to privacy, broadly protected by inc. XII of art. 5, and the right to evidence in the criminal procedure" (Gomes Filho 1996, 14), so that the legislator could not authorize interception for all crimes punished with reclusion, but only for those of exceptional gravity or whose particular form of execution required such measure.

Other country systems that also admit the measure work, in general, with the typicity or cataloging of crimes, a salutary measure and considered by Valente as "a constitutional imposition" (Valente 2008, 76) in Portugal, for example. Among us, Lenio Streck defends the case of partial nullity without reduction of the text of Section III of Article 2 of Law No. 9.296/96. For Streck, one cannot give the same treatment to goods that affect such different legal goods, such as, for example, equating tax crimes, money laundering and crimes against the environment, which "violate and cause multiple injuries to diffuse and collective legal goods" with crimes against property. Thus, observing that the STF faces similar issues either by interpreting in conformity with the Constitution, or by applying partial nullity without reduction of the text, Streck argues that it should be expressly excluded for unconstitutionality of a certain hypothesis of application of the normative program without producing an express change in the legal text (Streck 2001, 64).

Streck clearly states that "minor crimes, or crimes that do not endanger life, physical integrity or transindividual rights" cannot be subject to interception, so that the technique of partial nullity without reduction of the text must be applied to subsection III of article 2 of Law No. 9.296/96 to restrict its applicability "to serious crimes", "removing from the applicability of the expression 'crimes punishable by imprisonment' crimes that have less harmful effects" (Streck 2001, 70). This seems to us the only understanding coherent with the idea of the exceptionality of the relativization of the fundamental rights to the inviolability of communications, intimacy, privacy, and silence.

Therefore, it must be affirmed that in the interception of communications, the requirement of "necessity of the evidential measure" is configured in item I of art. 2 and in the *caput of* art. 4, both of Law nr. 9.296/96. And the requirement of "danger of loss of evidence" is configured in clauses II and III of art. 2 of Law nr. 9.296/96, being that the latter, following Lenio Streck's understanding, must be understood as partially null without reduction of text to include only crimes that "violate and cause multiple injuries to diffuse and collective legal assets". Having defined the necessary requirements for the judge to decide on the authorization or not of the interception measure, which in the basic syllogism indicates the major premise, we must now address the reasoning to be developed by the judge to identify the existence of the minor premise.

2. Evidential inferences for the granting of telephone interception measures

According to González Lagier, "proving a fact consists in showing that, in light of the information we possess, it is justified to accept that this fact occurred" (González Lagier, 2007). The reasoning developed that involves the facts we want to prove, the information we have, and a relationship between the fact we intend to prove and the evidence is what González Lagier calls evidential inference.

According to Matida and Herdy, in the legal sphere, "Evidential inference is the reasoning used by the judicial decision maker to justify the determination of a factual issue in court" (Matida & Herdy 2019, 133-155). It is the reasoning developed by the judge to determine whether the factual hypothesis contributed by the parties (allegations of fact, not the facts, let us stress) has been demonstrated according to the evidence. It is a fundamental step in the legal syllogism to establish the occurrence of a fact that can be considered as a minor premise

(allegation of fact) on which the major premise (rule) will be applied. The link between the facts (or the allegations of facts in the judicial process) and the evidence can be of different types, and for each of these types of links or connections one can distinguish their *foundation* (the requirements for the correctness of the link), their *purpose* (the objective, epistemic or practical, that this link tries to satisfy), and their *strength* (the degree of solidity that this link brings to the evidential inference) (González Lagier 2007).
In some cases, the link consists of a maxim of experience and is therefore *based on* the "observation of a more or less regular association between the facts" and "its purpose is to try to come as close as possible - given the circumstances of the proof - to the truth about the facts that are inferred" (González Lagier, 2007). In other cases these are rules directed to the judge that oblige him to accept as proven certain facts when prior facts are given. In this case the foundation is similar to the rules of experience, but based on norms or principles. In the first cases, the strength comes from the solidity of the inductive argument on which they are based, and in the second case from the normative character of the law. Based on this distinction, González Lagier (González Lagier, 2007) calls epistemic evidential inferences those whose link is a maxim of experience and normative evidential inferences those whose link is a norm (or a principle, we adduce).

Gonzalez Lagier also envisions a third type of inference that he calls interpretive. For him, facts, when they are the object of proof, "are complex entities that combine observational and theoretical elements" (González Lagier, 2007). The observational are those that depend on observation of reality through the senses and the theoretical (which he also calls normative or interpretative) are those that depend on the network of concepts with which we classify and understand them.
In this case, the central factor is the concepts and definitions that we accept and use to order the empirical material. Thus, for example, the concept of causal relation is fundamental to the successful classification of empirical data as causal relations, just as the concept of action is essential to determine whether a bodily movement can be considered an action. For the approach that will be taken, it is of interest to work on evidential inference from Stephen Toulmin's argument layout (Toulmin 2001, 139), from which, according to Matida and Herdy (Matida & Herdy 2019, 133-155), González Lagier (González Lagier, 2007) departed.
Toulmin, in asking himself what is involved in the process of establishing conclusions by producing an argument, presents the following scheme (*layout*): in presenting the *claim* or conclusion (C), one presents the data (D) understood as facts that give grounds for the claim. This conclusion may be challenged in the form "what do you have to go on?", which suggests a need to bring in new data, or it may be that the challenge is of the type "how did you get there?", which suggests the need for a justification for taking the step from data (D) to conclusion (C). In that case, continues Toulmin(Toulmin 2001, 141), we do not need to present new data, but propositions, such as rules, principles, licenses of inference, etc., that show it is appropriate and legitimate to move from data (D) to conclusion (C).
At this point what is needed are general, hypothetical statements that serve as a bridge and authorize the step. Toulmin calls these propositions guarantees (W), which are therefore distinct from data (D). Some guarantees may be self-authenticating (if a hair is red, then it will not be black) or not (anyone who is Swedish will not be Roman Catholic). In the first case, presenting the datum that John's hair is red allows one to conclude that John's hair is not black, since the guarantee that if a hair is red, then it is not black, is self-authenticating. In the second case, presenting a datum that Petersen is Swedish does not allow one to conclude that he is not Roman Catholic, because the guarantee that anyone who is Swedish will not be Roman Catholic is not self-authenticating (Toulmin 2001, 142).

For Toulmin, data (D) and guarantees (W) are distinct just as questions of fact are distinct from questions of law. In addition to guarantees being general, "one resorts to data explicitly; and to guarantees, implicitly" (Toulmin 2001, 143). Toulmin goes on to explain that there are several kinds of guarantees that "may confer different degrees of force on the conclusions they justify" (Toulmin 2001, 144). Some guarantees compel one to unequivocally accept the conclusion, others such that the step between the given (D) and the conclusion (C) can be represented by the expression "necessarily." Depending on the lesser strength of the guarantee, it may be possible that in addition to the given (D), the conclusion (C), and the guarantee (W) it is necessary to introduce a modal qualifier (Q), such that the adverb connecting the given (D) to the conclusion (C) can be expressed by "presumably", "probably", "possibly".

In this scheme of reasoning treated by Toulmin, another element can be inserted, which is the exception or refutation condition (R) of the guarantee (W) (Toulmin 2001, 145). Toulmin's example is as follows (Toulmin 2001, 145-146): it is claimed that "Harry is a British subject" (C) and the fact that "Harry was born in Bermuda" (D) is presented as a generic guarantee that "a man born in Bermuda will generally be British" (W), by provision of the British Nationality Acts. However, the argument is not conclusive if one does not add data about his ancestry and the possibility that he has changed nationality. Therefore, the modal qualifier in this case is "presumably" (Q), provided that Harry's parents are not foreigners (R1) and he has not adopted American citizenship (R2).

It is not difficult to see that we introduce, next to the guarantee, something that Toulmin calls *backing* (Toulmin 2001, 148). That is, it is possible that the collateral presented will be questioned. In this case, behind this guarantee there will be other endorsements without which the guarantees would have no authority or validity. In the example above, by backing the guarantee "a man born in Bermuda will generally be British" (W), we immediately back it up with the guarantee "by provision of the British Nationality Acts" (B), taken as the foundation of the guarantee.

Toulmin's *layout* provides us with a complex scheme involving an important argumentation context that is very useful for thinking about inferences in judicial proceedings, in view of the importance of the adversarial process. However, not only the examples, but the classification of inferences (epistemic, normative, and interpretive), guarantees (proposition establishing an infraction between facts, proposition prescribing an institutional preference, and proposition expressing formal and material conditions of correctness of a concept), and supports (rule of experience, legal rule, and conceptual rule) presented by Matida and Herdy (Matida & Herdy 2019, 133-155), will be very useful to us for the undertaking that will follow. It is then worth turning our understanding to the interception of telephone and data communications.

As already seen, the requirements for precautionary evidence are: (1) the "need for the evidential measure" (understood as certainty of the crime, probability of authorship, and pertinence of the evidential measure in relation to the intended purpose) and (2) the "danger of loss of evidence" (understood as the risk of loss of the source of evidence by the passage of time or by the prior knowledge of the investigated, according to new or contemporary factual data at the time of the decision).

In the interception of communications, the requirement of the "necessity of the evidential measure" is defined as item I of art. 2, *contrario sensu* (there must be evidence of authorship or participation in a criminal infraction) and the *caput of* art. 4 (the interception must be necessary to the investigation of a criminal infraction), both of Law nr. 9.296/96. And the "danger of loss of evidence" requirement is configured in clauses II and III of art. 2 of Law no. 9.296/96 a *contrario sensu*, that is, it is necessary that the evidence cannot be obtained by other means (*ultima ratio* probatória) and that the investigated fact constitutes a criminal infraction punishable with reclusion, restricted to crimes that violate and cause multiple injuries to diffuse and collective legal assets (following Lenio Streck's understanding) (Streck 2001, 64).

Therefore, we have here necessarily 4 factual allegations that must be presented by the communications interception requester and that must be demonstrated: (1) a crime punishable with reclusion was committed, causing multiple damages to diffuse and collective legal assets; (2) the author of the crime is the one whose interception of communications is requested; (3) the interception of communications is necessary to investigate the infraction; (4) there is no other means of proof or means of obtaining proof to produce the information sought. These factual hypotheses are what are called, in Stephen Toulmin's *layout*, allegations or conclusions (C). Naturally, it will be necessary to produce the information (informative elements in the case of investigations and which, therefore, cannot be called evidence because it is usually in the investigative phase of the prosecution) to perform the inferential reasoning. This information is, in Toulmin's *layout*, the data (D).

However, it is perfectly feasible to identify a *guarantee* (W) relative to the *normative evidential inference*, which is the rule of burden of proof. The person who requests the evidentiary injunction must prove all the four (4) factual hypotheses listed above. If he does not prove or if there is any doubt that all of these hypotheses are present, the judge must reject the interception of communications. This is due to the fact that the measure, as we know, relativizes some fundamental rights and, therefore, admitting it as a rule would be the same as violating the essential core of these rights.

The question that must be discussed, therefore, is whether the guarantee of the presumption of innocence that distributes the burden of proof for those who request the measure is respected in the practice of inferential reasoning performed by the magistrate or whether we identify problems of an epistemic order that violate this guarantee.

3. Epistemic problems of telephone interception

When deciding on the granting or extension of telephone interception, therefore, it is up to the judge to value the data at his disposal, develop inferential reasoning and identify whether the degree of confirmation of the accusatory hypothesis (standard) was reached to authorize or not the measure.

However, there are several problems that can arise in this activity. We will address some that we consider relevant according to the task to be performed: (1) *spurious generalizations*, which affect the guarantee of inferential reasoning and (2) *epistemic* (testimonial) *injustice*, which affects the speaker's credibility.

To address spurious generalizations, we will draw on Michele Taruffo's contributions on the topic (Taruffo 2016, 241). Regarding epistemic injustice, we will work with the concepts presented by Miranda Fricker (Fricker 2017, 53-60) and Jennifer Lackey (Lackey 2018).

3.1. Ultima ratio probatoria from rules of experience based on spurious generalizations

Michele Taruffo starts from a narrative conception of evidence, through which its author constructs his version of the facts and shapes reality (Taruffo 2016, 73). From this idea, the author presents the types of narrative construction: (a) category construction: the construction of narratives is founded on the activity of categorization and varies according to whether different categories (time, space, causality) or different concepts about the categories are used; (b) linguistic, semantic, and logical construction: The linguistic correctness of a narrative is essential for its comprehension (proper use of grammar and syntax), but also the use of words with appropriate meaning and logical coherence constructions; we also emphasize the need to distinguish between fact and value, since narrative constructions that are evaluative (e.g. ex. (c) social or institutional construction: constructing a narrative about a fact implies taking into account its social and institutional context, which goes far beyond empirical reality (e.g., a piece of green paper is an example of a car that has been in the air for too long).

e.g. a piece of green paper is a $100 bill by virtue of social, legal, and institutional conventions, not its empirical reality); (d) cultural constructs: any narrative is cultural in the sense that it "is founded in a culture and is constructed through a culture (understood as knowledge of the world)" (Taruffo 2016, 78).

As far as cultural constructs are concerned, "the coherence of a narrative can be defined in terms of its correspondence to the narrative models existing in the *stock of knowlegde* that constitutes the content of that culture" (Taruffo 2016, 78). Here *stock of knowlegde* is taken as common sense, i.e., an unordered body of knowledge, a complex broth of more or less grounded information.

In cases where it is not possible to resort to scientific evidence, the *backing of warranty* (in Toulmin's scheme, also used by Taruffo) is based on common sense, the *background knowledge, the* so-called maxims of experience, which the judge uses to link the available information to the hypotheses that are sought to be confirmed. These are inferences of a presumptive nature, and it is necessary to establish situations that make it possible to determine the degree of confirmation that the information attributes to the hypotheses about the facts.

Taruffo then presents four different situations:

(a) The notions of common experience are equivalent to universal scientific laws, configuring their vulgarization (bodies fall from top to bottom, for example). From this inference follows a conclusion to which is attributed the "character of deductive certainty" (Taruffo 2016, 242);

(b) Notions from common experience that correspond to non-universal generalizations, but have a high probability index based on statistical frequency (e.g. X produces Y in 98% of cases). This is not a deductive certainty, but it can have the character of a practical certainty;

(c) Common sense notions that are based on generalizations that express what appears to be the "normality" of events or behaviors, but which do not have a universal character and, therefore, are not deductive certainty, not even practical, due to the large number of contrary examples. In this case the hypotheses have a modest degree of confirmation;

(d) Notions of common experience that correspond to spurious or pseudo generalizations that have no basis in empirical reality. These are situations that express prejudices (of race, gender, religion, or any other kind) and stereotypes ("hysterical woman", "corrupt policeman", "black mugger", "Latino drug dealer", "unfaithful husband", etc.), often self-implied, that lead to a narrative fallacy that will only have persuasive power for an audience that shares the same prejudices.

It is somewhat clear that not all inferences can be based on scientific foundations vulgarized by notions of experience capable of establishing estimates of cause and effect to universally correct statements (depicted in the first situation described above). This is why statistical generalizations are used, based on the frequency of their occurrence. So, for example, by stating that Mexican food is spicy you are stating something that statistically is probable, but not inexorable. This type of generalization is justified by the empirical data on which it is based (which corresponds to the second situation described above). However, when generalizations lack empirical foundation, we are faced with spurious generalizations (Schauer, 2006).

Janaina Matida and Rachel Herdy give the example of spurious generalization as the claim that women are intellectually less capable than men. There is no empirical support for this claim that Matida and Herdy also call hasty and here we can say that these are spurious generalizations founded on prejudice, the main mobile for this kind of generalization, as well as stereotypes and social profiling (Matida & Herdy 2019, 133-155).

The fact is that the cognitive value attributed to evidentiary inferences will depend on the degree of confirmation, which will be higher as the basis of the guarantee moves away from spurious generalizations and gets closer to universal rules derived from scientific laws. A common generalization, which is not based on any scientific rule, nor on statistical aspects, is the understanding that "the Federal Police itself already does a screening and does not request [telephone interception] if they have not exhausted the diligences", as stated by Judge 4, interviewed during the research phase by this author.

It is true that most of the judges affirmed that there is no prior criterion; only the concrete case can reveal the need for the measure as the last fit. But we must praise the frankness of the answer given by Judge 4, who acknowledged that he understands that it is the police who decide in which cases there are no further steps to be taken.

Unfortunately, this is a generalization (that the police only request telephone interception when there is no other diligence to be done) that, despite not being prejudiced, is based on the stereotype of the "diligent investigator", who will only request the granting of the measure if there is no other suitable measure. It would be necessary for the request to present the factual hypothesis of the impossibility of performing another evidential measure, which would need to be supported by compatibility with the data. Therefore, what we see in practice is that, in the absence of clear and objective legal criteria on how to assess the cases in which the interception of communications is the *ultima ratio evatória*, it is common that stereotypes replace the requirements capable of determining the adequacy of the measure.

3.2. The "wiretap hermeneuts": acceptance as a propositional attitude and the renunciation of inferential reasoning as a manifestation of epistemic injustice

Ferrer Beltrán addresses the possibility that the judge, unlike belief which is involuntary, accepts a propositional attitude as the mental foundation of a verdict. Acceptance may change depending on the context, belief does not (Ferrer Beltrán 2016, 232).

It is true that the rules of evidence may in some cases oblige the judge to accept a premise, but they do not oblige him to believe it. Ferrer Beltrán gives an example in which the judge in a fraud case, which has deceit as one of its constitutive elements, has only the victim's statement that the deceit occurred, and all the other evidence indicates that the deceit did not exist. Suppose that a recording obtained in violation of the fundamental right of the accused shows him talking to his partner in a situation in which he recognizes and boasts of having committed fraud, recognizing, so to speak, the existence of the deceit. In this case it is clear that the judge is not going to disregard the fact that there has been a swindle in forming his conviction or belief, but in the context of the case, he may not accept the proposition that there has been a swindle. On the other hand, he may accept the proposition of the deception if in his private life he finds himself in a situation of carrying out or not a commercial transaction with that merchant (Ferrer Beltrán 2016, 233). Thus, Ferrer Beltrán explains, context-dependence is proper to acceptance as a propositional attitude and is so because an important characteristic is its relativity with respect to the elements of proof incorporated into the judicial expedient (Ferrer Beltrán 2016, 234).

It so happens that the strategy of changing belief by acceptance as a propositional attitude of the judge that the facts are proven (it is proven that *p* because the judge accepted that *p*) does not hold if one questions the reasons, the justification of this acceptance. It is based on these elements (reasons for acceptance) that one may evaluate the factual decision made by the judge and, therefore, one may reach the conclusion that the judge considered proved (accepted) *p*, but in reality *p* was not proved, that is, the judge's acceptance was not justified by the existing data in the case file. It is not difficult to identify in the practice of telephone interception the acceptance as propositional attitude of the judge. Intelligence reports are impregnated with interpretations and attributions of meaning quite different from the literal meaning of a conversation.

Admitting the interpretative proposition of the police authority and its agents by the judges who analyze a possible request for extension of telephone monitoring is common and implies not only the acceptance of the proposition that *p* is proven, but clearly results from a waiver, even if tacit, to perform the inferential reasoning on the elements of information available to the magistrate.

The most pernicious consequence of this practice is the detachment from reality and, therefore, the complete impossibility of offering a counter-explanation to the interpretation assigned by researchers. This is because signs are understood with meanings other than their vernacular use, and therefore any clarification that seeks to

reestablish the original meaning is ruled out by the prior acceptance of the proposition that there is a codified use of expressions outside their original signification.

When judging the receipt of the indictment in Inq 2424 ("Operation Hurricane") on September 20, 2008, Justice Gilmar Mendes spoke about telephone interceptions, expressing his discomfort with the conduct of the police agents who actually carry out the interception and interpretation of conversations (Machado 2016, 405422), calling them "wiretap hermeneuts":

The stories on this subject are well known. In fact, today we see a certain dysfunctionality in the model...

Today, then, we are facing quite delicate situations, especially in view of the abuses that have been reported and committed. Recently, on a visit to São Paulo, Ministers, I was talking to one of perhaps the most important newspaper publishers in Brazil, which had been affected in one of these operations because it had accepted a meeting, a lunch, a dinner with one of the people under investigation. This person apparently wanted the newspaper to retract a story that had been published, so they tried to arrange a lunch, and they had an envelope delivered. This envelope turned out to be the contents of a bribe, because, of course, we have the wiretapping hermeneuts. So this is an area where we have all sorts of abuses.

I almost exaggerate when I say that a Court like this fulfills a much more important function - and this function is not perceived - not because of what it does - and it does a lot, as we have shown here over time - but because of what it prevents from being done. When it inhibits that, from the first degree, from the police officer, the gendarme tempted to become a dictator, from giving his dreams a daydream. This is exactly what we have to do in this kind of matter. (no original emphasis)

There are at least two questions to be discussed about this reality: (1) is there a legal barrier to the interpretation given by the police to the intercepted dialogues? and (2) is there an epistemic dysfunction in the judge accepting the police interpretation as the correct one?

Our answer is positive to both questions. But we need to understand it in more detail.

As to the answer to the first question, it should be made clear that there is nothing that prevents the police authority from formulating a request for telephone interception, or for an extension, deducing its narrative for the configuration of the factual hypothesis that would attract the application of the invasive measure.

However, one should not confuse the request, foreseen in art. 4 of Law 9.296/96, with the detailed report mentioned in §2º of art. 6º of the same Law, which normally accompanies the request.

In the detailed report there can be no interpretation by the police authority and its agents, but only a transcription or summary of the conversations, strictly as determined by the applicable law. By inserting interpretation in the detailed report, the police authority and its agents not only extrapolate their function, but also connotate to the words and dialogues meanings that are different from those that the vernacular language regularly lends them.

This is not the function of the detailed report, whose content is defined by law and, therefore, such practice is legally illegal and must be considered illicit and extracted from the records, in accordance with art. 157 of the CPP. However, it is possible to think that the police authority and its agents could undertake an interpretative and persuasive task only when formulating the interception request, but not in the detailed report, so that we would not be facing illicit evidence, but a problem of epistemic nature.

Still, it is necessary to recognize that not in the legal sense, but in the epistemic sense, the police authority and its agents are "witnesses", since they transmit an information.

Rodas, Castelliano and Herdy state that "in technical terms of epistemology, testimony is an important source of knowledge", which from the legal point of view can be given with other means of proof or means of obtaining evidence that are not in the procedural technique properly testimonial proof, as is the case of the statements of the offended party or the expert opinion. What matters is that the "epistemic state of the judge (judge or juror) is

formed on the basis of what a person said (or wrote)" in order to be considered, epistemologically, as a witness who transmitted information (Rodas et al. 2021). In this way, the police authority and its agents, by interpreting the conversations and attributing to the words spoken meanings different from their literalness, are not only making a request, but transmitting information and assuming the epistemological position of witnesses.

In case the judge takes the propositional attitude of accepting as the correct interpretation the one performed by the police authority and its agents, we are facing an epistemic injustice.

Indeed, Miranda Fricker (Fricker 2017, 53-60) explains that there are two types of epistemic injustice: testimonial injustice and hermeneutical injustice. The first originates from a bias of the subject of knowledge that ends up removing credibility from the narrator. The second is based on an inequality of hermeneutical opportunities, a marginalization in relation to some area of social knowledge that causes a disadvantage to understand or make understand certain experience (as an example, Miranda Fricker exposes the difficulty of making sense of homosexual desire as a legitimizer of sexual orientation in a historical-social context in which homosexuality is interpreted as a perversion or a shame).

We are interested, however, in dealing with testimonial injustice. However, unlike Fricker, we agree with Matida that testimonial injustice does not only occur in the prior discrediting of certain witnesses due to prejudice, but "there is also testimonial injustice when *more credibility than is* due is attributed solely and exclusively to the social, ethnic, and even professional group to which the speaker belongs" (Matida 2020).

Jennifer Lackey (Lackey 2018), challenging Miranda Fricker's view, understands there are two types of testimonial injustice: distributive and normative. The former is of particular interest to us. For Lackey, unlike Fricker, credibility excesses play a much more important role in testimonial injustice. This is because credibility is a finite epistemic good. Distributive testimonial injustice occurs when credibility is improperly distributed among members of a conversational context or community due to bias.

This can happen because of over-credibility of experts or specialists, which causes a decrease in the credibility of those who are reporting the opposite of what the experts are reporting. The same happens with people who socially enjoy social prestige as authority figures, religious leaders, and CEO's. There is a stereotyping that gives an excess of credibility to certain speakers, but which consequently takes credibility away from others. Police credibility was clear in the interviews with the judges. Judge 2 stated the following:

PF has a lot of *know how* and a lot of care. They present a report every two weeks, they analyze what is in each line and transcribe (I order transcription). Today in the eproc system, the system provides a transcription feature. I listen to the main audios (2/3 for each line) to check the transcription, the intonation and the interpretation.

The judge, although he has been diligent in listening to the audios, does so on the assumption that the Federal Police has know how and does so to "check" the "interpretation", that is, it is the police interpretation that conditions the judicial understanding.

What can be seen is that the attribution of excessive credibility to the information given by the police authority and, especially, by its agents, acting as "hermeneuts of the wiretap", attributing a meaning different from the literal pattern, ends up causing a decrease in the credibility of all the other epistemic subjects that state information opposite or simply different from that attributed by the police officers. This sets up a distributive epistemic witness injustice, in which, because excessive credibility is attributed to the police agents, the word of the accused is discredited and any reaffirmations that give a literal meaning to the conversations are ignored or even ridiculed by the judges.

Even when they are not ridiculed, it is undeniable that the judges assume that the correct version is the one resulting from the police interpretation, and that it is up to the accused to present his version and undo the

understanding originally attributed. In the interviews conducted with the judges, Judge 4 provided this information.

The police decode the conversation, because of the use of slang (they know they are committing a crime and speak in codes or ciphers, and can predict that they are being intercepted.) But when doing the interpretation, it is necessary to listen to the audios. The interpretation is taken into account when extending the interception (it is not an uncritical acceptance, I see if it makes sense). Then when it goes to the process, I ask what he meant.

E.g. one operation was investigating cocaine trafficking in ship containers. It was a gang of longshoremen. They contaminated the containers with the drugs, put the drugs inside, without the controller knowing. They knew where the container was going to be on the ship (it had to be easily accessible to pick up - e.g. on top and not refrigerated). So in one interception one said to the other "we have to look for the top apartment", clearly he meant the container. He said he was going to a brothel and liked the top apartment. Anyway, the Federal Police decodes it, and if it is a reasonable interpretation, I accept it, but during the interrogation I give the subject the opportunity to explain what he meant. This is really frequent in the practice of interceptions.

It is not difficult to notice that the interpretation (called decoding by the judge) by the police is given greater credibility, and that the explanation that may depart from the police understanding is understood as an opportunity given at the end of the instruction, in the interrogation of the accused. There is a consequent discrediting of the assumption that people are committing crimes and, therefore, speak in codes or slang because they anticipate that they are being intercepted.

Basically, there is not a presumption of innocence, but a presumption of correct interpretation by the police officers, both because of the credibility they enjoy and because of the discrediting of the investigated, or distributively implying the discrediting of the word of the investigated.

Conclusion

The first conclusion we reached was, as a precautionary evidence, telephone interception must meet the requirements of "necessity of the evidential measure" and "danger of loss of evidence" to be authorized.

The requirement of the "necessity of the evidential measure" is defined in item I of art. 2, *contrario sensu* (there must be evidence of authorship or participation in a criminal infraction) and in the *caput of* art. 4 (the interception must be necessary to the investigation of a criminal infraction), both of Law nr. 9.296/96. And the "danger of loss of evidence" requirement is configured in clauses II and III of art. 2 of Law no. 9.296/96 a *contrario sensu*, that is, it is necessary that the evidence cannot be obtained by other means (*ultima ratio* probatória) and that the investigated fact constitutes a criminal infraction punishable with reclusion, restricted to crimes that violate and cause multiple injuries to diffuse and collective legal assets (following Lenio Streck's understanding) (Streck 2001, 64).

There are necessarily four factual allegations that must be presented by the communications interception applicant and that must be demonstrated: (1) a crime punishable with reclusion has been committed, causing multiple damages to diffuse and collective legal assets; (2) the author of the crime is the one whose interception of communications is requested; (3) the interception of communications is necessary to investigate the infraction; (4) there is no other means of proof or means of obtaining proof to produce the information sought. The inferential reasoning should be developed by the magistrate competent to determine the interception based on the data provided by the applicant of the measure. However, and this is the second conclusion we reached, what was observed in the empirical research is that we have at least two epistemic problems in telephone interception.

The first is that in the absence of clear and objective legal criteria on how to assess the cases in which the interception of communications is the ultima ratio, it is common that stereotypes, especially that the requester is

always a "diligent police officer", replace the data capable of demonstrating the existence of the requirements to determine the appropriateness of the measure.

The second is that there is an epistemic injustice arising from the interpretation given by the police officer responsible for the execution of the telephone interception measure. By attributing too much credibility to what is considered as police decoding of the criminal language, any alternative explanation is ruled out because of what is understood as distributive epistemic injustice.

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